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Supreme Court, U.S.
FILED

No. _____ (1)

08-406 JUL 29 2008

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In The

Supreme Court of the United States

C'EST MOI, INC.,

Petitioner,

v.

NEW HAMPSHIRE INSURANCE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the maritime law doctrine of *uberrimae fidei,* dealing with alleged misrepresentations in the application for a marine insurance policy, may be expressly waived, and a standard more favorable to the insured may be established by the express language of a marine insurance policy covering a vessel.

2. Whether the federal maritime law requires the federal courts to take into account the law of the state where a marine insurance policy was issued, in determining the interpretation to be given to policy language.

PARTIES TO THE PROCEEDING

The parties are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The sole shareholder of petitioner C'Est Moi, Inc., is Larry O'Rourke.

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OPINION BELOW

The Ninth Circuit Court of Appeals opinion is reported at 519 F.3d 937 (9th Cir. 2008). The District Court Opinion is reported at 406 F. Supp. 2d 1077 (C.D. Cal. 2007).

STATEMENT OF JURISDICTION

The Ninth Circuit filed its decision on March 20, 2008 (App. 1), and entered an order denying petitioner's motion for rehearing and rehearing *en banc* on May 1, 2008 (App. 26). The petition is timely under 28 U.S.C. section 2101(c) and Supreme Court Rule 13.1 because it was filed July 31, 2008, within 90 days of the entry of the opinion and judgment sought to be reviewed. The petitioner was subsequently given an additional 60 days to September 30, 2008, in which to re-file its petition in order to correct certain technical deficiencies in the formatting of the petition. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no Federal Statutory provisions involved. However, the federal maritime law, and its doctrine of *uberrimae fidei*, and its uniform

application in all of the circuit courts of appeal in the United States, is at issue in this petition.

STATEMENT OF THE CASE

This was a case of first impression for the Ninth Circuit with respect to the doctrine of *uberrimae fidei*. The case deals with insurance coverage for the loss of an exquisitely rebuilt yacht. The Ninth Circuit was asked to decide, for the first time, whether the parties to an insurance contract may contract around the harsh doctrine of *uberrimae fidei*, and choose a more favorable standard for the insured when rescission of the policy of insurance is based upon alleged misrepresentations or omissions. The Ninth Circuit ignored consistent precedents in other Circuits and ruled that *uberrimae fidei*, a concept implied at law and not express in the insurance contract, trumped the express language of the insurance policy. In doing so, it has created a conflict among the circuits and has ignored prior precedents of this court.

In this case, New Hampshire Insurance Company ("NHIC"), issued a policy of insurance on a luxury powerboat yacht called C'Est Moi, which was owned by the Defendant/Petitioner, C'Est Moi, Inc. ("C'Est Moi"). The policy was first issued on August 17, 2001, and was renewed annually for three years. It was last renewed on August 17, 2004, at which time the insured value of the vessel was $1,075,000. The policy included a clause requiring that, in order

for the insurer to void the policy, there must be a misrepresentation or omission on the part of the insured which was both intentional ***and*** material. (Paragraph 10 of the insurance policy, *see* App. 3-4) On October 29, 2004, the vessel sank at its dock in Newport Beach, California, probably due to a malfunction of the bilge pump system. C'Est Moi, through its sole shareholder, Larry O'Rourke ("O'Rourke"), who was also the loss payee on the policy, made a claim for damages against NHIC. NHIC thereafter took the position that the vessel was not worth $1,075,000 but rather only $50,000 prior to sinking. NHIC further alleged, contrary to the language of the policy, that the insured made misrepresentations and/or omissions and that any *intentional* misrepresentation or omission, or any *unintentional* misrepresentation or omission that was *material,* would void the policy. Finally, NHIC took the position that the cause of the loss was not covered, and filed a complaint for rescission in the Central District of California.

On cross motions for summary judgment, Judge Carter, of the U.S. District Court for the Central District of California, ruled that the policy language requiring that any alleged misrepresentation or omission be ***both*** intentional and material did not apply. Judge Carter thus ignored the language of the policy contracted for by the parties and applied the doctrine of *uberrimae fidei*, a standard that favors the insurer to a much greater extent than the language of the policy at issue here, and which is not included in the express language of the policy. He rescinded the policy on the grounds that there were material

misrepresentations and/or omissions by the insured, deciding – contrary to the language of the policy – that it did not matter whether the alleged misrepresentations were intentional or not. The policy language, however, required that any misrepresentation or omission be not only material, but also intentional to permit rescission of the policy.

C'Est Moi appealed to the Ninth Circuit from Judge Carter's legal error in refusing to apply the language of the insurance contract and from the failure to recognize multiple genuine issues of material fact presented that would preclude summary judgment, including the materiality of the alleged misrepresentations or omissions.

The Ninth Circuit affirmed the District Court, holding that an alleged misrepresentation or omission need not be ***both*** material ***and*** intentional in order to rescind the policy. It held that the implied at law doctrine of *uberrimae fidei* overrides the specific language of the policy written by the insurer. In doing so, the Ninth Circuit offers no reasonable basis or argument for rendering an opinion which conflicts with other Federal Courts who have held that the language of the policy should prevail under principles of freedom of contract. It further fails to address important questions regarding the application of state law to the interpretation of a marine insurance policy. This Court requires that state law be applied to the interpretation of a marine insurance policy, but the Ninth Circuit does not even mention California law or its application to the language of the policy,

which imposes a different standard, more favorable to the insured, in determining when an alleged misrepresentation is sufficient to warrant the rescission of the policy.

The opinion of the Ninth Circuit would encourage insurers to write express contractual coverage favorable to the insured, all the while knowing that those express terms will not be enforced, and that at the end of the day, some higher standard, of which the insured has no knowledge, less favorable to the insured, and which contradicts the language of the policy will control. Such a ruling countenances fraudulent and deceptive marketing. This Court should affirm the well entrenched principle that a policy of insurance should be interpreted according to the plain meaning of the language, and, if there is an ambiguity, it should be interpreted in favor of the insured. The Ninth Circuit's opinion ignores this universal principle, which is also recognized by California law. Further, other district courts and circuit courts of appeal have consistently held that the parties to an insurance contract may contract around the application of the implied at law doctrine of *uberrimae fidei*. The Ninth Circuit has ignored this important aspect of federal maritime law and charted a new course which conflicts with the other decisions.

The opinion of the Ninth Circuit, unless reversed, will lay the grounds for mischief and confusion in the nation on the issues it purports to treat, and will be used to argue that it is acceptable for insurers to use

misleading and fraudulent language in their insurance policies.

REASONS FOR ALLOWANCE OF THE WRIT

A. The Ninth Circuit's Opinion Directly Conflicts with an Existing Opinion by Another Court of Appeals and Substantially Affects a Rule of National Application in Which There Is An Overriding Need for National Uniformity

This case involves a marine insurance policy and the failure of the insurer (NHIC) to pay its million dollar policy limits upon the loss of the ship it insured. The Ninth Circuit's opinion concludes that the doctrine of *uberrimae fidei*, one which is hardly on the lips of every insurance applicant, authorizes rescission of the policy, even though the policy language says differently. Hence, the key issue the Ninth Circuit was required to address was whether the insurer may, by virtue of its policy language, provide coverage that is more favorable to the insured than the statutes or the common law might otherwise require, since it is incontrovertible that the insurer in this case wrote a policy which is more favorable to the insured than the doctrine of *uberrimae fidei*.

Federal and State courts around the nation have addressed this question routinely, referring to it as an issue of freedom to contract. Universally, they have held that the parties are free to contract around

statutes or common law, so long as the coverage provided is more favorable to the insured than required by the statute. The Ninth Circuit in this case has thrown that principle out the window, and, in the process finds itself in conflict with a longstanding case out of the Eleventh Circuit, *King v. Allstate Insurance Co.*, 906 F.2d 1537, 1539-41 (11th Cir. 1990) and all other Federal and State courts which have ruled upon the question, or closely analogous questions. In so doing, the Ninth Circuit has given no reasoned argument to abandon a principle that has been well-entrenched in the law. While it encourages the Eleventh Circuit to reconsider the question the next time they have occasion to rule on it (Slip Opinion p. 2728), it offers no cogent or persuasive reason to do so.

At issue here is whether the maritime common law doctrine of *uberrimae fidei* (or the highest good faith), which requires both parties to a maritime contract of insurance to deal with each other with the highest good faith, can be waived or contracted around by the language of an insurance contract. Under the doctrine of *uberrimae fidei*, it does not matter whether a misrepresentation or inaccuracy in the application process is intentional or unintentional. As long as it was material, the result is the same, the policy can be rescinded.

The policy in this case, however, offered very specific language, written by the insurer itself, regarding the grounds upon which the policy could be rescinded. This policy language is different from the standard of *uberrimae fidei*, and created a standard

more favorable to the insured. Under the policy language, the policy could be rescinded only if the misrepresentation was **both** material and **intentional**.

> 10. CONCEALMENT OR MISREPRESENTATION:
>
> "Any relevant coverage(s) shall be voided if you **intentionally** conceal or misrepresent any material fact or circumstance relating to this insurance, or your insurance application, before or after a loss." (App. 3-4) (Emphasis added.)

This very clear and unequivocal language, which is more favorable to an insured than the default rule of *uberrimae fidei*, has long ago been interpreted by the Eleventh Circuit. In *King v. Allstate Ins. Co.*, 906 F.2d 1537, 1540-41 (11th Cir. 1990), the insured had a policy with language nearly identical with the policy language in the case at bar. The policy stated:

> " . . . this policy is void if you intentionally conceal or misrepresent any material fact or circumstance, before or after loss."

The Eleventh Circuit, 18 years ago held, that the parties were perfectly free to contract around *uberrimae fidei*. As the court in *King* said:

> "There being no public policy problem whatsoever in parties to a maritime insurance contract setting the terms of the policy between them, we uphold their freedom to do so." (*Id.* at 1541.)

The Ninth Circuit's opinion in this case could not conflict more directly and obviously with the Eleventh Circuit's long-standing opinion in *King*. However, rather than provide some persuasive basis for departing from *King*, the Ninth Circuit simply says that it is unpersuaded by *King*, and lays down a rule that would require any departure from the principle of *uberrimae fidei* to require "very clear policy language, unequivocally disclosing a mutual intent to supersede the insured's common law obligation." In the case at bar, the policy language clearly discloses an intent to supersede the insured's common law obligation. The Ninth Circuit's citation to a law journal is no better at providing any persuasive reason for its departure from the other decisions around the country.

With the sole exception of this case, every federal court that has issued a decision on this matter has held, as did *King*, that the principle of freedom to contract should be upheld; that the parties may contract around the doctrine of *uberrimae fidei*; and, that, if an insurer chooses to use language in its policy more favorable to the insured than applicable statutes or the common law, they should be permitted to do so. No case, other than this one, has criticized this aspect of the holding of *King* or any of is progeny. No case, other than this one, has held that the insured should be denied the benefit of clear, unambiguous policy language that sets up a standard regarding rescission which is more favorable to the insured than the doctrine of *uberrimae fidei*.

In *Connecticut Indem. Co. v. Perrotti*, 390 F. Supp. 2d 158 (D. Conn. 2005) the insurer refused to pay on a marine policy of insurance, claiming misrepresentation in the application process, as NHIC claims. As NHIC does, the insurer in *Perrotti* argued that the maritime doctrine of *uberrimae fidei* applied. The language of the policy in *Perrotti* was virtually identical to the language of the NHIC policy at issue in the case at bar. The court found that the policy language was controlling and there could be no rescission of the policy unless the misrepresentation was both intentional and material. (*Id.* at 167) *Accord, Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 890 (5th Cir. 1991); *Neiman v. Provident Life & Accident Ins. Co.*, 217 F. Supp. 2d 1281, 1286 (D. Fla. 2002) (parties to a contract are generally free to contract "out of" or "around" state or federal law.)

Many other courts have consistently recognized this right of the parties to determine the terms of their own insurance contract. In *Skinner v. Aetna Life & Casualty*, 804 F.2d 148, 149-51 (D.C. Cir. 1986), the D.C. statute established that (as with *uberrimae fidei* and California law), where there was a nonintentional material misrepresentation, it constituted grounds for rescission. The court held that the policy language, not the statute, was controlling, and the insurer had to prove both intent and materiality in order to rescind. *Accord*, *William Penn Life Ins. Co. v. Sands*, 912 F.2d 1359, 1364 (11th Cir. 1990) ("We decline Penn Life's invitation to protect it from a risk it assumed by virtue of the contractual language it

drafted"); *State Farm Fire & Casualty Co. v. Oliver*, 854 F.2d 416, 419-20 (11th Cir. 1988) (language nearly identical to the NHIC policy the insurer could contractually give the insured a standard for judging misrepresentations that was more favorable than that provided by the statute); *In re Healthsouth Corp. Ins. Litig.*, 308 F. Supp. 2d 1253, 1270 (D. Ala. 2004); *Espinosa v. Guardian Life Ins.*, 856 F. Supp. 711, 717 (D. Mass. 1994) (applying federal law – though federal law might allow rescission in the case ordinarily, once an insurer had entered into a policy by using language in its contract more favorable to the insured than the law provides, it could not rely on a rule of law which was more stringent than the policy language); *Progressive Northern Ins. Co. v. Bachmann*, 314 F. Supp. 2d 820, 829-830 (W.D. Wis. 2004) (doctrine of *uberrimae fidei* was not applicable where insurer had contractually limited its grounds for rescission to an intentional misrepresentation by virtue of the language of its policy); *Nakanishi v. Allstate Ins. Co.*, 1994 U.S. Dist. LEXIS 4790 at p. 8 (S.D. Cal. 1994) (policy provision requiring intent and materiality applied in case, despite California Insurance Code sections 331, 332 requiring only materiality.)

State courts, including courts in California, have found the same principle to be applicable. *Mission National Insurance Co. v. Coachella Valley Water District* (1989) 210 Cal.App.3d 484, 497 (insurer had the right to enlarge coverage beyond the statutory language, and obviously did so to achieve the objective of insuring the insured.)

Although California has codified the maritime common law doctrine of *uberrimae fidei* in its Insurance Code (California Insurance Code, sections 331 and 332) *Mission* makes it clear that the parties may provide coverage more favorable to the insured. Indeed, the California Insurance Code explicitly incorporates this concept of freedom of contract as it applies to the misrepresentation issue. Section 336 states that "[t]he right to information of material facts may be waived . . . (a) by the terms of insurance." NHIC has done so, but the Ninth Circuit's decision fails to recognize or address this principle.

The principle of freedom of contract, upon which these decisions are grounded, is a principle which has permeated the common law and the maritime law, and has been recognized by the Ninth Circuit and this Court. (*Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 372 (9th Cir. 1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972) (freedom of contract is an ancient principle). *See also*, *Smith v. The Ferncliff*, 306 U.S. 444, 450 (1939) (maritime case – the general rule of our law is freedom of contract).

The Ninth Circuit's opinion does great mischief to the long-established principle of freedom of contract. It makes the concept of freedom of contract an illusion, and, in so doing, conflicts with the approach of the Eleventh Circuit, the U.S. Supreme Court, and other circuits around the nation with respect to freedom of contract in maritime contracts.

The attitude of the courts on whether an insurer may waive the protection of *uberrimae fidei* by its policy language, has been summed up nicely in the following quote:

> "As PXRE would have it, "uberrimae fidae is not merely 'custom and practice,' but is the legal standard that governs the cedent-reinsurer relationship" (Mem. 8). But it is simply not true that a contract freely entered into by parties such as PXRE and Lumbermens is trumped by a doctrine that, like other statements of legal rules, is a default rule. No case suggests that the Agreement's provision quoted in the preceding paragraph, with its express negation of any warranties, representations or other agreements that are not in the document itself, is somehow contrary to public policy so as to be overridden by uberrimae fidae or any other doctrine." *PXRE Reinsurance Co. v. Lumbermens Mut. Cas. Co.*, 2004 U.S. Dist. LEXIS 9343 (N.D. Ill. 2004)

Hence, it can be clearly seen from this long line of consistent decisions involving Federal courts from the Second, Fifth, Seventh, and Eleventh Circuits, that each and every time the courts have been faced with the question of whether policy language which is more favorable to the insured than state statutes, or *uberrimae fidei*, should be applied, the courts have opted to make the policy language determinative. This is consistent with the principle of freedom of contract discussed above. The sole exception is the

case at bar. These cases, involving the interaction and the application of statutes from California, Louisiana, Florida, Illinois, Massachusetts, Connecticut, Wisconsin, the District of Columbia, and Federal law, are all consistent with each other, but conflict with the Ninth Circuit's opinion. This is especially a matter of importance since this is a case of first impression in the Ninth Circuit (App. 4).

Maritime law, the treatment of maritime contracts generally, and the treatment of maritime insurance contracts in particular, ought to be uniform throughout the nation. It is not only unseemly for the Ninth Circuit to be out of harmony with the other Federal and State courts, but it also creates uncertainty in the maritime insurance arena.

It is unclear why the Ninth Circuit in this case felt it necessary to deviate from the uniform decisions around the country, which support the concept of freedom of contract and which permit an insurer to provide coverage more favorable to the insured, by modifying statutory or common law principles through its own chosen policy language. But, the result is that the Ninth Circuit's opinion in this case sticks out like the proverbial sore thumb. It strands the insured on a deceptive policy that becomes a proverbial "sinking ship." Petitioner urges this Court to reverse the Ninth Circuit's discordant opinion.

Since there was no finding at either the district court level or in the Ninth Circuit's opinion that there was any intentional misrepresentation on the part of

C'Est Moi, Inc., the language of the policy forbids the insurer, NHIC, from attempting to rescind the policy. According to the plain, unambiguous language of the policy, the policy will not be voided unless there is a misrepresentation which is **both material and intentional**. Hence, the decision of the district court and the Ninth Circuit must be reversed.

B. The Ninth Circuit's Opinion Involves a Question of Exceptional Importance and Conflicts with Existing Opinions of the U.S. Supreme Court because it Completely Fails to Address or Apply the Relevant Law of the State of California to the Interpretation of the Insurance Policy

It has long been established by the U.S. Supreme Court that in matters of the interpretation of a contract of maritime insurance, State law applies. (*Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 321 (1955); *Kiernan v. Zurich Cos.*, 150 F.3d 1120, 1123 (9th Cir. 1998).)

The opinion of the Ninth Circuit in this case utterly disregards California law. Indeed, not a single cite is made to any law regarding the interpretation of insurance contracts. This is a striking deficiency, because what the Ninth Circuit has done with its opinion, is to not just interpret the meaning of paragraph 10 of the policy, but to completely rewrite it to mean something other than what it plainly says. But, contrary to the holding of *Wilburn Boat* and *Kiernan*, the panel has done so without so much as a passing

reference to California law on the interpretation of insurance contracts.

While it is clear that the language of paragraph 10 of the insurance policy is not ambiguous, and means exactly what it says, even if it were considered ambiguous by the court, resort would have to be made to the provisions of California law to interpret its meaning. The Ninth Circuit has failed to do this. If it had done so, it could not have reached the conclusion it did.

The courts in California are clear that ambiguities in a policy are construed against the party who caused the uncertainty to exist (i.e., the insurer) in order to protect the insured's reasonable expectation of coverage. (*Powerine Oil Co., Inc. v. Superior Court* (2005) 37 Cal. 4th 377, 391.) The courts liberally interpret the policy in favor of coverage. (*State Farm Mutual Auto v. Jacober* (1973) 10 Cal.3d 193, 201-02.) If semantically permissible, the contract will be given such construction as will fairly achieve its object of securing indemnity to the insured for the losses to which the insurance relates. (*Wildman v. Government Employees' Ins. Co.* (1957) 48 Cal.2d 31, 35.) The courts endeavor to resolve doubts and ambiguities in the interpretation and construction of the policy in favor of the insured (California Civil Code §1654; *Raulet v. Northwestern Nat. Ins. Co.* (1910) 157 Cal. 213), and thus prevent the insurer from taking an unjust and unfair advantage of the insured and weaken the purpose for which the policy was issued. (*Pfeiffer v. General Ins. Corp.*, 185 F. Supp. 605, 609

(S.D. Cal. 1960). Under California law, insurance policies are to be broadly construed to afford the greatest possible protection to the insured (*Podell v. Walbrook Ins. Group*, 119 F.3d 1411, 1413 (9th Cir. 1997), even though the insurer may have contemplated a different construction. (*Pilcher v. NewYork Life Ins. Co.* (1972) 25 Cal.App.3d 717.)

Had the Ninth Circuit addressed California law in interpreting the meaning of paragraph 10 (assuming it felt paragraph 10 meant something other than what it clearly says), as required by U.S. Supreme Court precedent, it could not have reached any other conclusion than that the language must be given an interpretation which favors the insured and coverage. Accordingly, the Ninth Circuit decision must be reversed.

C. The Ninth Circuit's Opinion Involves a Question of Exceptional Importance because the Policy in Question has Language Favorable to the Insured, which is used very Commonly around the Nation in Boating Insurance Policies, and the Panel's Opinion Fails to give the Language its Common, Obvious Meaning

The language of the NHIC policy, paragraph 10, is not uncommon. The Ninth Circuit was advised that NHIC had over 3000 policies like it in existence. (Excerpts of the Record before the Ninth Circuit Court of Appeals 0128) The court was also advised by an insurance expert Robert Ray that such

provisions are very common, (Excerpts of the Record before the Ninth Circuit Court of Appeals 0519-0520) and are a widespread industry practice designed especially to accommodate the needs of the weekend yacht owners. (Excerpts of the Record before the Ninth Circuit Court of Appeals 0520)

The insurer is free to choose any terms and any wording it desires for its policy. However, surely the federal courts could not desire to establish a rule of law that permits an insurer to choose language which declares coverage broader for the insured than otherwise provided for by law (as this policy language clearly does) and then smugly withdraw it when a claim is filed, saying in effect, "Sorry! Our policy doesn't really mean what it says!" To do so would be to establish a rule of law in the federal courts which approve a fraud. This, in effect, is what the decision of the Ninth Circuit in this case does.

No rational person could read the language of paragraph 10 of the NHIC policy in the case and come away believing anything other than that it would require an intentional and material misrepresentation in order to void or rescind the policy.

It is axiomatic under both Federal and State law, that the language of contract, including an insurance contract, is to be construed to give effect to every provision. *See, e.g., National City Police Officers Assoc. v. City of National City* (2001) 87 Cal.App.4th 1274, 1279; *City of Atascadero v. Merrill Lynch Pierce Fenner & Smith, Inc.* (1998) 68 Cal.App.4th 445, 473.

The opinion of the Ninth Circuit fails to resolve this conflict between the provisions of the law which require each provision of the contract to be given effect, and its opinion which leaves one wondering what paragraph 10 means, if it does not mean what its plain language sets forth. If it means anything other than what it plainly says, such a meaning would be unknowable and undiscoverable by the insured.

Furthermore, the rule purportedly established by the Ninth Circuit's opinion reverses the normal burdens placed on insured and insurer. Instead of interpreting the policy in favor of the insured, the Ninth Circuit has interpreted it in favor of the insurer. What the Ninth Circuit and Justice Kozinski, have done therefore conflicts with years of precedent, because the traditional rule of construction in admiralty cases is to "construe the contract language most strongly against the drafter." *American Export Isbrandtsen Lines, Inc. v. United States*, 390 F. Supp. 63, 66 (S.D.N.Y., 1975), *citing United States v. Seckinger*, 397 U.S. 203, 210-11 (1970); *see Royal Indemnity Co. v. Kenny Const. Co.*, 528 F.2d 184, 190 n. 7 (7th Cir. 1976); *Jones v. United States*, 304 F. Supp. 94, 103 (S.D.N.Y., 1969), *aff'd*, 421 F.2d 835 (2nd Cir. 1970). Thus, the Ninth Circuit's opinion conflicts with Supreme Court precedent (*United States v. Seckinger*), as well as other circuit precedents in terms of how to handle the language of the policy drafted by NHIC. To allow such an opinion to stand would be an embarrassment to the Federal Court system and would create mischief in the future.

If the language of paragraph 10 of the NHIC policy does not mean what it says, what does it mean? Notably, the Ninth Circuit's opinion fails to answer this question. The Ninth Circuit's opinion will be used by insurers in the future to justify their use of ambiguous language, and to justify their arguments that they are entitled to rescind a policy even though the plain language of the policy says otherwise. It will place a judicial stamp of approval on misleading, deceptive language in insurance policies, and on insurers' efforts to avoid paying claims based upon such misleading and misrepresented language. This Court can hardly desire this type of result.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 25, 2008

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW HAMPSHIRE INSURANCE CO., *Plaintiff-Appellee*, v. C'EST MOI, INC., *Defendant-Appellant*.	No. 06-55031 D.C. No. CV-05-00243-DOC OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted
August 9, 2007 – Pasadena, California

Filed March 20, 2008

Before: Alex Kozinski, Chief Judge, Johnnie B. Rawlinson, Circuit Judge, and Miriam Goldman Cedarbaum, Senior District Judge.*

Opinion by Chief Judge Kozinski

COUNSEL

Robert G. Dyer, Law Offices of Robert G. Dyer, San Diego, CA, for the defendant-appellant.

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* The Honorable Miriam Goldman Cedarbaum, Senior United States District Judge for the Southern District of New York, sitting by designation.

Neil S. Lerner and Benjamin A. Shapiro, Sands Lerner, Los Angeles, California, for the plaintiff-appellee.

OPINION

KOZINSKI, Chief Judge:

We consider the doctrine that's on everyone's lips: *uberrimae fidei.*

Facts

Lawrence O'Rourke purchased C'Est Moi, Inc. (C'Est Moi) in 1986, and became its president and sole shareholder. As part of this purchase, O'Rourke acquired a yacht owned by C'Est Moi, and subsequently insured it through Washington International Insurance Co. (Washington International). A fire destroyed the yacht in 1992, and Washington International paid O'Rourke $450,000 for the loss. O'Rourke reacquired the yacht from Washington International at salvage, paid off a loan and began restoring it. Washington International stopped insuring the yacht after the fire, and it remained uninsured until 2001, when C'Est Moi obtained insurance from New Hampshire Insurance Company (NHIC).

In 2004, the yacht sank in calm waters while docked at Newport Beach, California. O'Rourke, on behalf of C'Est Moi, filed an insurance claim. NHIC investigated and determined that the likely cause was a malfunctioning bilge pump. NHIC then sued

C'Est Moi to rescind the insurance policy, and the district court granted summary judgment in favor of NHIC, holding that *uberrimae fidei* applied and that C'Est Moi misrepresented material facts on its insurance application. C'Est Moi appeals.

Analysis

[1] 1. *Uberrimae fidei* is a "longstanding federal maritime doctrine" that "applies to marine insurance contracts." *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, No. 06-35383, slip op. at 1857, 1874 (9th Cir. Feb. 11, 2008); *see also* Cal. Ins. Code § 1900. *Uberrimae fidei* "imposes a duty of utmost good faith," *Inlet Fisheries*, slip op. at 1864, so "an applicant for a marine insurance policy is bound to reveal every fact within his knowledge that is *material* to the risk," *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 420 (9th Cir. 1998) (emphasis added). If an insured fails to do so, the insurer may rescind the policy, even if the material misrepresentation wasn't intentional. *Id.*

C'Est Moi argues that paragraph 10 of the insurance policy's General Conditions and Exclusions section supersedes its *uberrimae fidei* obligation by substituting a different, and lower, standard:

> 10. CONCEALMENT OR MISREPRESENTATION:
>
> Any relevant coverage(s) shall be voided if you *intentionally* conceal or misrepresent any material fact or circumstance relating to

> this insurance, or your insurance application, before or after a loss.

(Emphasis added.) C'Est Moi reads this clause as allowing NHIC to rescind the insurance policy only for a material misrepresentation that is intentional.

[2] It's an open question in this circuit whether parties may modify or eliminate an insured's *uberrimae fidei* obligation through terms in the insurance policy. However, if this were possible at all, it would certainly require very clear policy language, unequivocally disclosing a mutual intent to supersede the insured's common law obligation. *Uberrimae fidei* is a well-entrenched doctrine that protects not merely the insurer but also the integrity of the risk pool; only "an unambiguous statement" in the policy, purporting to supersede the doctrine in express terms, would be sufficient to accomplish that purpose. T. Schoenbaum, The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law, 29 J. Mar. L. & Com. 1, 13 (1998). The clause here comes nowhere close: It does not mention *uberrimae fidei* or its colloquial equivalent, the "duty of utmost good faith," and it doesn't purport to supersede other rights and responsibilities that the parties may have vis-a-vis each other by operation of law. In short, nothing in paragraph 10 of the policy indicates that it is meant to displace rights or responsibilities imposed by operation of law rather than create an additional set of rights and responsibilities.

We acknowledge that the Eleventh Circuit in *King v. Allstate Insurance Co.*, 906 F.2d 1537, 1539-41 (11th Cir. 1990), held that a policy clause similar to paragraph 10 was sufficient to supersede the insured's duty under *uberrimae fidei,* but (for reasons explained above) we are unpersuaded and decline to follow the Eleventh Circuit. We hope, rather, that our colleagues there will reconsider this question the next time they have occasion to rule on it.

[3] 2. The district court correctly found that there is no factual dispute as to whether C'Est Moi made material misrepresentations in the insurance policy application. "The fact that the insurer has demanded answers to specific questions in an application for insurance is in itself usually sufficient to establish materiality as a matter of law." *Freeman v. Allstate Life Ins. Co.*, 253 F.3d 533, 536 (9th Cir. 2001) (quoting *Thompson v. Occidental Life Ins. Co.*, 9 Cal.3d 904, 915 (1973) (in bank)). Here, NHIC's insurance application asked for the yacht's purchase price and present insurer, and C'Est Moi misrepresented both facts, thereby making material misrepresentations as a matter of law.[1]

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[1] C'Est Moi's misrepresentation of either the yacht's purchase price or its present insurer is sufficient to uphold the district court's ruling that C'Est Moi made material misrepresentations. We therefore do not address whether C'Est Moi also made a material misrepresentation by failing to list all of O'Rourke's prior marine losses on the insurance application.

[4] C'Est Moi listed the yacht's purchase price in 1986 as "$450,000++," while O'Rourke only paid about $300,000 for the yacht when he bought it in 1986. C'Est Moi doesn't dispute that the yacht's purchase price was $300,000. Instead, it argues that the $450,000 figure is accurate because it reflects the amount that O'Rourke had spent restoring the vessel, and that the purchase price wasn't material because the yacht was destroyed by the 1992 fire. But when a marine insurance application "specifically asks for the purchase price," the insured may not substitute, without a clear explanation, the "present market value" for the "actual purchase price." *Certain Underwriters at Lloyd's v. Montford,* 52 F.3d 219, 222 (9th Cir. 1995) (emphasis omitted). The purchase price of a vessel "is unquestionably a fact material to the risk," *id.,* as it provides an objective measure of the vessel's worth and the corresponding risk of insuring the vessel. The value of the vessel, as it may or may not have been increased by the owner's efforts over the years, is a far more debatable proposition. It requires an evaluation of whether work done on the vessel was merely for normal upkeep or truly enhanced its worth, and by how much. An insured is not free to substitute his own subjective evaluation of worth for what the insurance company sought to obtain, namely a purchase price that can be presumed to be objective because it was arrived at through arm's length negotiations between parties with opposing interests. By failing to disclose the purchase price and substituting another figure, without clearly disclosing that it had done so, C'Est

Moi made a material misrepresentation to NHIC, in violation of its duty of *uberrimae fidei*.

[5] C'Est Moi also stated that "Wash Int" was the "present marine insurer," but the yacht wasn't insured in 2001 when the application was filled out. C'Est Moi argues that it made this mistake because the forms were confusing (NHIC's quote request form asked for the *previous* insurer, while its insurance application asked for the *present* insurer). This may show that C'Est Moi's misrepresentation wasn't intentional, but under *uberrimae fidei*, NHIC only needs to show that the misrepresentation was material. *Cigna*, 159 F.3d at 420. NHIC was under the impression that it was taking on a risk that another insurance company had been insuring against, which would have led NHIC to believe that C'Est Moi was a good candidate for insurance. We can presume that, if NHIC had known that the yacht had been uninsured for about 9 years, this "would have affected [NHIC's] decision to insure at all or [. . .] at a particular premium." *Inlet Fisheries*, slip op. at 1877 (quoting *N.Y. Marine & Gen. Ins. Co. v. Tradeline (L.L.C.)*, 266 F.3d 112, 123 (2d Cir. 2001)). C'Est Moi therefore made a material misrepresentation by listing "Wash Int" as the present insurer, when the yacht was actually uninsured.

There was no factual dispute as to either of these issues, so summary judgment for NHIC was proper.

3. C'Est Moi also argues that the district court erred by relying on the declaration of Rod Clingman – the NHIC underwriter who issued the policy – in determining that the misrepresentations were material. Specifically, C'Est Moi asserts that Clingman's declaration should have been stricken, as C'Est Moi couldn't impeach Clingman because NHIC failed to give C'Est Moi its underwriting guidelines during discovery. But C'Est Moi's misrepresentations were material as a matter of law; Clingman's declaration is beside the point. *See Inlet Fisheries,* slip op. at 1877; *Freeman,* 253 F.3d at 536; *Cigna,* 159 F.3d at 420; *Montford,* 52 F.3d at 222.

* * *

[6] The parties didn't attempt to contract out of *uberrimae fidei,* and C'Est Moi misrepresented material facts in the insurance policy application. NHIC was therefore entitled to rescind the policy, so the district court correctly granted NHIC summary judgment.

AFFIRMED.

UNITED STATES DISTRICT COURT,

FOR THE CENTRAL DISTRICT OF CALIFORNIA

NEW HAMPSHIRE INSURANCE COMPANY,	**CASE NO. SA CV 05-243 DOC (RNBx)**
Plaintiff,	**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
v.	
C'EST MOI, INC.,	
Defendant	
	(Filed Dec. 6, 2005)

Before the Court are Plaintiff New Hampshire Insurance Company's ("NHIC") Motion for Summary Judgment ("Plaintiff's Motion") and Defendant C'Est Moi, Inc.'s ("CMI") Motion for Partial Summary Judgment ("Defendant's Motion"). After considering the moving, opposing and replying papers, and the oral argument of both parties, for the reasons below, the Court hereby GRANTS Plaintiff's Motion and DENIES Defendant's Motion.

I. BACKGROUND

Plaintiff NHIC is a Pennsylvania corporation with its principal place of business in New York. Defendant CMI is a Delaware corporation with its principal place of business in Newport Beach, California. CMI owns a

fifty-six foot boat, the "C'Est Moi," built in 1980. In 1986, Lawrence O'Rourke acquired CMI and the C'Est Moi boat, which is the sole asset of CMI. O'Rourke is the sole shareholder of CMI. This case concerns the marine insurance policy issued by NHIC to CMI insuring the C'Est Moi.

In 1992, a fire occurred aboard the C'Est Moi, resulting in a total loss of the boat. The insurer, Washington International Insurance ("Washington International"), paid the insured value of the C'Est Moi, $450,000, less the $50,000 deductible. O'Rourke subsequently purchased the aluminum hull back from Washington International for $50,000, and repaid to Horizon Credit Corporation a loan of $179,861.48 that had been used to purchase the boat. In 1998, O'Rourke began rebuilding the boat.

On August 17, 2001, CMI submitted a "Pleasure Yacht Application" ("Application") to NHIC for the purpose of obtaining marine insurance on the C'Est Moi. CMI submitted the Application to NHIC through Hayden Insurance Services ("Hayden Insurance"), and its agent, Chip Bishop. CMI's disclosures on the Application included the following:

(1) Date purchased and price: "1986;" "450,000 ++"

(2) Builder/Manufacturer: "Poole Chaffee"

(3) Loss History: "1992 Washington Mutual $450,000 (see attached)"

(4) Prior Owned: "57' Stevens"

(5) Present Marine Insurer: "Wash Int'"

Compl. Ex. A. As required by the Application, CMI attached marine surveyor Thomas Bell's survey of the boat, dated July 20, 2001 ("Bell Survey"). The Bell Survey stated that the C'Est Moi was a work in progress that was 65% completed, and that had a market value of $670,000. Compl. Ex. B. It stated that an addendum survey would be submitted as work progressed. *Id.*

After receiving the Application, NHIC issued a one-year Yacht Policy, No. YM-341-84-84 ("Policy"), to CMI, providing hull coverage on the C'est Moi in the amount of $670,000. The Policy included the following provisions:

(1) "CONCEALMENT OR MISREPRESENTATION: Any relevant coverage(s) shall be voided if you intentionally conceal or misrepresent any material fact or circumstance relating to this insurance, or your insurance application, before or after a loss."

(2) "COOPERATION WITH US: In the event of a loss covered by this policy you must cooperate with us fully."

(3) "Hidden Defect: We shall pay for indirect physical loss of damage caused by any hidden defect in the machinery, the hull or other defective part."

Compl. Ex. C. The Policy became effective on August 17, 2001.

On January 21, 2002, NHIC received a request from CMI through Hayden Insurance to increase hull

coverage to $1,075,000, based on an attached "Addendum to Survey," dated January 13, 2002. The Addendum stated that Bell conducted a survey on January 11, 2002, and found that the C'est Moi was 80% complete with a market value of $1,075,000. Compl. Ex. E. Upon receiving the request, NHIC increased the hull coverage to $1,075,000, effective February 6, 2002. Decl. of Roderick H. Clingman ¶ 6. Subsequently, the Policy was renewed for one year terms on August 17, 2002, August 17, 2003, and August 17, 2004.

On October 29, 2004, the C'est Moi took on water and sank in calm waters while moored at a private dock in Newport Beach, California. CMI subsequently filed a claim on the Policy, and NHIC assigned marine surveyor Peter Britton to investigate the claim on November 1, 2004. Britton determined that the back-siphoning of seawater through the boat's automatic bilge system caused the boat to flood and sink. Loss Update/Status Report of Peter Britton 3. In February 2005, NHIC requested that CMI allow another marine surveyor to investigate the C'Est Moi, but CMI refused the request.

While investigating whether to pay on the Policy, and during the course of discovery in this case, NHIC has discovered facts that it alleges were either not disclosed or misrepresented by CMI on the Application. Specifically:

(1) A Buyer's Closing Statement indicates that O'Rourke purchased the C'Est Moi for $292,001. Decl. of Neil S. Lerner Ex. J;

(2) O'Rourke stated in his Examination Under Oath ("EUO"), taken December 23, 2004, that Fred Gledhill built the C'Est Moi. *Id.* Ex. A at 9:11-12;

(3) Marine surveyor Kells Christian surveyed the C'Est Moi, and in a letter to O'Rourke dated February 8, 2001, stated that the value of the boat at that time was $250,000, with a target value of $500,000. Compl. Ex. H.

(4) O'Rourke once owned a 30-foot Charger boat that caught fire and had a loss in 1989 involving damage to a propeller. Lerner Decl. Ex. A, H (Def.'s Resps. to Pl.'s Special Interrogs.).

(5) When CMI applied for the Policy in August 2001, the C'Est Moi was not insured. Decl. of O'Rourke in Opp'n to Pl.'s Mot. ¶ 15.

On March 11, 2005, NHIC informed CMI that it would not pay on the Policy. Compl. Ex. I.

On March 14, 2005, NHIC filed in this Court its Complaint for Rescission, Voiding, Denial of Insurance Benefits, and Declaratory Relief as to a Policy of Marine Insurance ("Complaint"). The Claim alleged seven claims for relief: (1) rescission of the Policy based on misrepresentation and concealment under maritime law; (2) rescission of the Policy based on fraudulent valuation under California insurance law;

(3) voiding of the Policy based on breach of implied warranty of seaworthiness; (4) voiding of the Policy pursuant to Policy provision concerning intentional concealment or misrepresentation; (5) voiding of the Policy pursuant to Policy provision concerning fortuitous loss; (6) voiding of the Policy pursuant to Policy provision concerning cooperation of insured; and (7) declaratory relief determining the parties' respective rights under the Policy. NHIC has moved for summary judgment on all claims; CMI has moved for partial summary judgment as to all claims, reserving for trial only that portion of the declaratory relief claim concerning the amount of money NHIC owes to CMI under the Policy.

II. SUMMARY JUDGMENT LEGAL STANDARD

Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994 (1962). However, the existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; to defeat the motion, the non-moving party must affirmatively set

forth facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 S.Ct. 2505, 2510 (1986). The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact for trial. *Id.* at 256, 106 S.Ct. at 2514. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence of a genuine issue of material fact from the non-moving party. *Musick v. Burke,* 913 F.2d 1390, 1394 (9th Cir. 1990). The moving party need not disprove the other party's case. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2553-54 (1986).

When the moving party meets its burden, the "adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Fed. R. Civ. P. 56(e). "The mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Anderson,* 477 U.S. at 252, 106 S.Ct. at 2512.

III. DISCUSSION

A. Rescission for Misrepresentation and Concealment under Maritime Law

Plaintiff NHIC and Defendant CMI have each moved for summary judgment on NHIC's claim of rescission of the Policy based on misrepresentation and concealment under maritime law. As discussed below, the parties largely do not dispute the facts at issue; instead, they disagree about whether maritime law or the Concealment or Misrepresentation provision in the Policy should govern this claim.

A marine insurance contract is governed by maritime law and thus invokes federal admiralty jurisdiction. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735, 81 S.Ct. 886, 890 (1961). However, given the long history of state regulation of marine insurance contracts, state maritime insurance law governs the interpretation of a marine insurance contract in the absence of a judicially established federal maritime rule or federal statute. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313-14, 75 S.Ct. 368, 370 (1955). California law and federal admiralty law are "materially the same" on the issue of rescission for misrepresentation or concealment; therefore, the Court will interpret the Policy under California law. *Certain Underwriters at Lloyd's v. Montford*, 52 F.3d 219, 222 n.1 (9th Cir. 1995).

Under both federal and California maritime law, an applicant for marine insurance is bound by the duty of *uberrimae fidei*, or "uttermost good faith," to

reveal, even if not asked, every fact within his knowledge that is material to the risk. *Cigna Prop. & Cas. Ins. Co. v. Polaris Pictures Corp.*, 159 F.3d 412, 420 (9th Cir. 1998); *Montford,* 52 F.3d at 222. This duty of "uttermost good faith" is codified by California statute, which requires an applicant for marine insurance to disclose "the exact and whole truth in relation to all matters that [the applicant] represents or, upon inquiry assumes to disclose." Cal. Ins. Code § 1900(b). If an insured makes a representation that is "intentionally false in any respect, whether material or immaterial," an insurer may rescind the marine insurance contract. Cal. Ins. Code § 1904. Thus, an insurer may rescind a marine insurance policy "if it can show either intentional misrepresentation of a fact, regardless of materiality, or nondisclosure of a fact material to the risk, regardless of intent." *Polaris Pictures,* 159 F.3d at 420 (quoting *Washington Int'l Ins. Co. v. Mellone,* 773 F.Supp. 189, 191 (C.D. Cal. 1990)).

1. Applicability of *Uberrimae Fidei* Duty in Light of Policy Provision

CMI contends that the duty of *uberrimae fidei* is inapplicable because the parties to the Policy have contracted around this maritime law doctrine. CMI contends that the Concealment or Misrepresentation provision of the Policy contracts around the doctrine. The Concealment or Misrepresentation provision provides that "[a]ny relevant coverage(s) shall be

voided if [CMI] intentionally conceal[s] or misrepresents any material fact or circumstance relating to this insurance, or [CMI's] insurance Application, before or after a loss." Policy, General Conditions and Exclusions ¶ 10. Thus, CMI argues that NHIC is entitled to rescission of the contract only for intentional concealment or intentional misrepresentation of material facts, and that NHIC is not entitled to rescission for intentional misrepresentation of non-material facts or unintentional nondisclosure of material facts.

CMI cites *King v. Allstate Insurance Co.*, 906 F.2d 1537 (11th Cir. 1990), in support of its assertion that parties to a marine insurance contract are free to contract around the duty of *uberrimae fidei*. In that case, the Eleventh Circuit found that language in the insurance policy voiding the policy for intentional concealment or misrepresentation of material facts represented the parties' decision to contract around the duty of *uberrimae fidei*. 906 F.2d at 1542. However, while the Eleventh Circuit recognized that parties to an insurance contract are generally free to contract around state or federal law, the court also stated that parties are free to do so only "so long as there is nothing void as to public policy or statutory law about such a contract." *Id.* at 1540. Unlike in the *King* case, here, the California legislature has explicitly codified the doctrine of *uberrimae fidei* in the insurance code. *See* Cal. Ins Code § 1900(b). Thus, a contract provision purporting to contract around that doctrine would be void as to California statutory law.

CMI cites no California cases or Ninth Circuit cases that have addressed the specific issue of whether a party to a marine insurance contract may contract around the codification of the duty of *uberrimae fidei.* At oral argument, CMI's counsel submitted that this lack of case law weighs against the applicability of the duty in this case. However, the Court is reluctant to counter the express codification of this duty by the California legislature. Therefore, given the codification of this well-established maritime law duty, the Court finds that the Policy provision does not contract around the duty.

Therefore, CMI is bound by the duty of *uberrimae fidei,* and NHIC may rescind the Policy "if it can show either intentional misrepresentation of a fact, regardless of materiality, or nondisclosure of a fact material to the risk, regardless of intent." *Polaris Pictures,* 159 F.3d at 420.

2. Misrepresentation or Concealment

NHIC contends that CMI misrepresented or concealed material facts in its Application for marine insurance, and thus, regardless of CMI's intent, NHIC may rescind the Policy. NHIC argues that CMI misrepresented or concealed the following facts on its Application: (1) the purchase price of the C'Est Moi; (2) prior losses; (3) the present insurer of the boat; (4) prior marine surveys valuating the C'Est Moi at a lower price than the Bell Survey; (5) the manufacturer of the boat; and (6) prior boat ownership. The

Court finds as a matter of law that at least three of these facts are material and were misrepresented or concealed by CMI on the Application.

i. Purchase Price

Materiality of facts is determined "solely by the probable and reasonable influence of the facts upon the party to whom the communication is due." *C.N.R. Atkin,* 137 F.3d at 1171 (quoting Cal. Ins. Code § 334). The effect on the actual insurer, not some reasonable insurer, is the focus of the inquiry. *Id.* (quoting *Imperial Cas. & Indem. Co. v. Sogomonian,* 243 Cal. Rptr. 639, 644 (1988)). A marine insurer's specific inquiry about a fact is usually sufficient to establish materiality as a matter of law. *Pac. Ins. Co. v. Kent,* 120 F. Supp. 2d 1205, 1212 (C.D. Cal. 2000) (citing *Merced County Mut. Fire Ins. Co. v. California,* 233 Cal. App. 3d 765, 772 (1991)). In this case, the Application specifically asked about the purchase price of the C'Est Moi. Compl. Ex. A. When an application specifically asks for the purchase price of a boat, the purchase price is "unquestionably a fact material to the risk." *Montford,* 52 F.3d at 222.

In response to the Application's inquiry about purchase price, CMI represented that the price was "450,000 ++" dollars. Compl. Ex. A. However, the purchase price of the C'Est Moi was $292,001. Lerner Decl. Ex. J. CMI does not dispute that the incorrect purchase price was written on the Application; rather, it argues that the notation "450,000 ++" represented

the amount of money O'Rourke had spent trying to rebuild the boat, and that this figure was intended to supply NHIC with information necessary to assess the risk. CMI offers the declaration of Robert Ray, who states that the most important factor in the underwriting of a boat is the current value of the boat, not the original purchase price of a boat that is being rebuilt after a total loss. Decl. of Robert Ray ¶ 48. However, the actual underwriter of the Policy, Clingman, relied upon the purchase price as stated in Application. Clingman Decl. ¶¶ 8, 11. Thus, the purchase price was a material fact because the Application specifically requested such information, and because Clingman actually relied upon the information. *See Montford,* 52 F.3d at 222 (holding that a marine insurer was entitled to void a policy under the duty of *uberrimae fidei* where the insurance applicant represented the "present market value" of a vessel when the applicant specifically asked for the purchase price). Therefore O'Rourke's misrepresentation of the purchase price breaches the duty of *uberrimae fidei,* and NHIC may rescind the Policy based on this misrepresentation of a material fact.

ii. Prior Losses

"An insurance applicant's loss history is a fact material to the risk." *Id.*; *see Polaris,* 159 F.3d at 420 (finding that failure to disclose loss history was a failure to disclose a fact material to the risk). The Application requested loss history, and did not limit the inquiry to a finite number of years or a particular

vessel. Compl. Ex. A. While CMI disclosed the 1992 fire loss of the C'Est Moi, it did not disclose two other losses, including a fire on O'Rourke's 30-foot Charger boat. Lerner Decl. Ex. A. O'Rourke claims that he did not remember the fire on the Charger boat because it was "so minor . . . and occurred so long ago . . . " Decl. of O'Rourke in Opp'n to Pl.'s Mot. ¶ 12. However, since loss history is a material fact as a matter of law, *Montford,* 52 F.3d at 1222, concealment of this material fact breaches the duty of *uberrimae fidei,* regardless of intent. *Polaris Pictures,* 159 F.3d at 420. Therefore, NHIC may rescind the Policy based on this misrepresentation of a material fact.

iii. Present Insurer

On the Application, CMI represented that its "present marine insurer" was "Wash Int'," which referred to Washington International, the insurer who paid on the 1992 fire loss of the C'Est Moi. Compl. Ex. A. However, at the time CMI filled out the Application, it had no marine insurance on the C'Est Moi. Decl. of O'Rourke in Opp'n to Pl.'s Mot. ¶ 15. Since the Application specifically asked for the boat's present insurer, such information was material as a matter of law. *See Pac. Ins.,* 120 F. Supp. 2d at 1212. Moreover, the underwriter, Clingman, considered this information about a present insurer "important since it was disclosed . . . that Washington International had paid off on a large loss in 1992 on this vessel." Clingman Decl. ¶ 20. CMI argues in its papers and at oral argument that no underwriter would have

believed that a boat such as the C'Est Moi would have insurance after a prior total loss. However, CMI's statement in the Application that it [sic] its "*present* marine insurer" was Washington International clearly expressly stated otherwise. Compl. Ex. A (emphasis added). Based on CMI's concealment of this material fact, NHIC may rescind the Policy.

Due to CMI's concealment of the purchase price, prior losses and the present insurer of the C'Est Moi, the Court finds that there is no genuine or disputed issue of material fact concerning whether CMI breached the duty of *uberrimae fidei,* and that NHIC is entitled to judgment as a matter of law on its claim of rescission for misrepresentation or concealment. Based on these undisputed facts, CMI is not entitled to summary judgment on this claim.

B. Other Claims for Relief

NHIC's other claims seek essentially the same relief as NHIC's rescission claim based on misrepresentation or concealment: namely, nullification of the Policy.[1] Having granted summary judgment of

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[1] As mentioned above, NHIC's other claims for relief are: rescission of the Policy based on fraudulent valuation under California insurance law; voiding of the Policy based on breach of implied warranty of seaworthiness; voiding of the Policy pursuant to Policy provision concerning intentional concealment or misrepresentation; voiding of the Policy pursuant to Policy provision concerning fortuitous loss; voiding of the Policy pursuant to Policy provision concerning cooperation of insured;

(Continued on following page)

rescission based on misrepresentation or concealment under maritime law, the Court need not address the other claims for rescission and voiding of the Policy on which the parties have moved for summary judgment. The Court is also aware of the pending state case in Orange County Superior Court, captioned *C'est Moi, Inc. and Lawrence O'Rourke v. New Hampshire Insurance Co., Peter Britton and Does 1 to 50,* Case No. 05CC04273. On September 23, 2005, the Superior Court stayed that case pending resolution of NHIC's rescission action presently before this Court. Having granted summary judgment for rescission of the Policy based on misrepresentation or concealment under maritime law, the Court declines to address summary judgment on the other claims in the alternative, which may have preclusive effect in the state court action.

IV. DISPOSITION

For the reasons set forth above, the Court hereby GRANTS NHIC's motion for summary judgment on NHIC's claim for rescission of the Policy based on misrepresentation or concealment under maritime law, and DENIES CMI's motion for summary judgment on the claim.

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and declaratory relief determining the parties' respective rights under the Policy.

IT IS SO ORDERED.

DATED: December 6, 2005

/s/ David O. Carter
DAVID O. CARTER
United States District
Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NEW HAMPSHIRE INSURANCE CO., Plaintiff-Appellee, v. **C'EST MOI, INC.,** Defendant-Appellant.	No. 06-55031 D.C. No. CV-05-00243-DOC Central District of California, Los Angeles **ORDER** (Filed May, 1, 2008)

Before: **KOZINSKI**, Chief Judge, **RAWLINSON**, Circuit Judge, and **CEDARBAUM**,* Senior District Judge

Appellant's petition for rehearing and rehearing en banc is denied. *See* Fed. R. App. P. 35; Fed. R. App. P. 40.

* The Honorable Miriam Goldman Cedarbaum, Senior United States District Judge for the Southern District of New York, sitting by designation.